MPJA COMMITTEE COMMENT ON COURT RULE AMENDMENTS
FOR IMPLENTATION OF 2008 PA 199-203
(ADM File No. 2008-29)

I. Proposed Rule 3.903(11) – Added to existing definition of "Guardian": …"and a juvenile guardian appointed pursuant to MCL 712A.19a or MCL 712A.19c."

COMMITTEE COMMENT: It is recommended that the language in this subsection use the word "or" rather than "and" in the added language, as this conjunctive is consistent with the earlier terminology in the existing rule.

Proposed Rule 3.903(13) – Added to Definitions: " 'Juvenile Guardian' means a person appointed juvenile guardian of a child ….."

COMMITTEE COMMENT: The use of the word "juvenile" in the definition is unnecessary. It violates the convention regarding using the term to be defined in the definition, and when read literally, implies that the person appointed as a guardian would be a juvenile.

II. Proposed Rule 3.921(D) – Added provision: Persons Entitled to Notice in Juvenile Guardianship Proceedings.

COMMITTEE COMMENT: The statute (MCL 712A.19c(2), PA 2008 203) does not delineate who or what entities are entitled to notice, so this Court Rule appears to be necessary. The theory behind this provision seems to track the notice provisions in the Probate Court Rule, MCR 5.125, but greatly expands the class of those entitled to notice in a Juvenile guardianship (compare with MCR 5.125(C)(19)and (20)).

The Committee suggests:
A. Remove any ambiguity relating to putative fathers by amending 3.921(D)(3) by adding the additional provision "… subject to the provisions of subpart (C) of this rule" at the end of the proposed provision dealing with notice to parents.
B. Add a provision (subsection (10)) which specifically names the MCI Superintendent as a person receiving notice in all cases brought under MCL 712A.19c. The committee recognizes that subsection (2) already names the Department of Human Services as a notice recipient, but is concerned that parties and courts might only give local DHS notice in permanent ward cases, which might not reach the superintendent. Also, this incorporates the statutory consent requirements into the Court Rule.
C. Change subsection (4) to clarify that the notice is to be given to the proposed juvenile guardian in situations prior to the first appointment. The provision would read: "The proposed juvenile guardian and/or juvenile guardian."
D. Change subsection (8) to use terminology consistent with other rules giving notice to Indian tribes or bands (for example, MCR 3.980(A)). It may be difficult for petitioners and Courts to maintain current information regarding "tribal leaders" as individual tribal leaders may change frequently. Therefore, it would be consistent with other court rules

to provide that notice should be given to "the child's tribe, Indian custodian, and if the tribe is unknown, to the Secretary of the Interior."

III. Proposed Rule 3.965(E)(5) – Added provision to allow the case to be screened to determine its eligibility for concurrent planning.

COMMITTEE COMMENT: The statute (MCL 712A.19(12) and (13)) makes concurrent planning an option (uses the word "may") in allowing multiple permanency plans in a case. It has been pointed out that the Children's Rights Lawsuit settlement seems to require DHS to develop concurrent plans in every case. We think is better to leave it discretionary in the Court Rule to maintain consistency with our state statute.

The committee is concerned with the word "eligibility" for concurrent planning. What makes a case "eligible"? After discussion on alternative phraseology (e.g., "appropriate" or "applicable"), the Committee recommends that the rule be changed to read: "(5) that the case may be reviewed for concurrent planning." It is noted that this provision is in the context of the Preliminary Hearing court rule – very early in the process – and not much information is available to make a judgment about concurrent planning. The simpler proposal does provide notice, which is all that is sought at this point.

IV. Proposed Rule 3.975(F)(2) - Adds a provision to the dispositional review hearing rule to require review of the concurrent plan, if applicable.

COMMITTEE COMMENT: None. This just makes good sense to review the concurrent plan, if there is one, as part of case review, and the language is straightforward and unambiguous. The Committee suggests that if the wording of Proposed Rule 3.965 is settled (as to "eligible", "appropriate", "applicable" or some other standard), the wording of this subrule be consistent with that choice.

V. Proposed Rule 3.976(D)(2) – Adds a provision to the Permanency Planning Court Rule requiring the Court to obtain the child's view regarding the permanency plan.

COMMITTEE COMMENT: The court rule tracks the statutory language directly. (MCL 712A.19a(3); 2008 PA 200) The Committee recommends adoption of the rule as written.

VI. Proposed Rule 3.976(E)(1) – Adds a provision to the Permanency Planning Court Rule authorizing and requiring the Court to consider in-state and out-of-state placements, based on the child's best interests. It also requires the court to ensure appropriate transitional services from foster care to independent living.

COMMITTEE COMMENT: Again this tracks the statutory provision directly. (MCL 712A.19a(3); 2008 PA 200) The Committee recommends adoption of the rule as written.

VII. Proposed Rule 3.976(E)(3) - Adds important provisions to the Permanency Planning Court Rule to conform to the substantive statutory changes:
1. Changes the "must" to "may" for the Court to order the agency to initiate terminations proceedings.
2. Adds the statutory (and federal) rule of 15 of the most recent 22 months as the trigger for a mandatory TPR filing.
3. Provides a number of "safe havens" for the Court to refrain from ordering a TPR petition filing even if the "15 of 22" trigger is reached.

COMMITTEE COMMENT: This is all, either directly or very close to, statutory language. (MCL 712A.19a(6); 2008 PA 200) The old 42 day rule for filing the petition is carried forward and inserted in the proposed court rule, although that standard is no longer in our state statute. The committee recommends is that this be changed to require that the petition be filed "forthwith, and in no case later than 28 days after the permanency planning hearing". There is, at this stage of proceedings, no reason for further delay filing a TPR petition; the issues have been defined and narrowed during the period in which the child was under the court's jurisdiction, and presumably been reviewed at the permanency planning hearing. This was also a suggestion brought up at the adoption forum meetings held in 2008.

VIII. Proposed Rule 3.976(E)(4) - Adds a provision (subsection (d)) to the Permanency Planning Court Rule authorizing the juvenile guardianship as another permanency planning option.

COMMITTEE COMMENT: The added language does not present a problem as it adds the option of a juvenile guardianship as another acceptable permanency plan as authorized by MCL 712A.19a(7). However, we did notice in reviewing this that the prior language of the court rule did not track the statute; i.e., the options set out in the court rule differ from those in MCL 712A.19a(7). Also, the statute says that the court "shall" order one or more of the enumerated alternative placement plans, while the court rule says the court "may" order one of the alternatives. Whether it is appropriate or necessary to address at these issues at this time, the Committee does not take a position, as it is beyond the scope of the proposed amendments.

IX. Proposed Rule 3.977(D) - Changes the old rule in TPR cases which required suspension of parenting time if a TPR petition was filed. Now, the court rule tracks the new statute (MCL 712A.19b(4); 2008 PA 199) that makes the suspension of parenting time a matter of the court's discretion and decision when a TPR petition is filed.

COMMITTEE COMMENT: This tracks the statute; it is straightforward and unambiguous. No changes are suggested.

X. Proposed Rules MCR 3.977(E),(F)and (G) - These three subrules implement the changes to MCL 712A.19b (2008 PA 199) which change the standard in Termination of Parental rights cases.

COMMITTEE COMMENT: The statutory change is quite simple but profound. In analyzing the proposed Court Rules, the committee started with the organic statute, and then considered the existing law and standards of proof, much of which was never required by statute but created by case law and the existing Court Rule. The statutory basis that allows termination of parental rights is found in MCL 712A.19b(3) which has not been changed in any significant way:

> **"**The court may terminate a parent's parental rights to a child if the court finds***, by clear and convincing evidence***, 1 or more of the following: …. (then follows the statutory grounds for termination (a - n) with which courts and attorneys practicing in this area are all familiar and the only changes to which are linguistic clean-up)" [Emphasis added]

The point is that there is no material change to statutory grounds in TPR cases. What is changed is in MCL 712A.19b(5) which eliminated the "reverse presumption" ("unless the court finds that termination of parental rights to the child is clearly not in the child's best interests") and now simply reads:

> "(5) If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made."

Now the question to ask is: What is the standard of proof for "best interests"? We know that the standard of proof for statutory grounds is clear and convincing evidence because the statute (19b(3)) says so. But b(5) does not address a burden of proof, and it is not a **necessary** inference to carry the b(3) standard forward. The committee believes it is advisable to address this explicitly in the court rules. Unfortunately, things get muddy fast under the current proposal, to-wit:

A. MCR 3.977(E)(2), dealing with termination of parental rights at the initial disposition, tacks the "best interest" issue to be determined at the adjudicative phase of the proceeding, and applies a "preponderance of the evidence standard. This is workable, but analytically questionable: Shouldn't the "best interests" determination be made at the initial dispositional hearing, which is covered in MCR 3.977(E)(3), even in cases which request termination in the initial petition?

B. MCR 3.977(F), dealing with termination of parental rights on the basis of different circumstances, adds the best interest analysis as another factor, to be considered by a clear and convincing evidentiary standard, under MCR 3.977(F)(1)(b). Thus, we would have a different evidentiary standard for best interests depending on whether termination was sought in an initial petition or in a supplemental petition. The committee does not see any statutory or policy reasons for this different procedure.

C. MCR 3.977(G), dealing with termination of parental rights in "other" circumstances (which generally would apply to no-progress reunification cases), mirrors subsection (F), supra, by covering "best interests" as another factor to be proven by clear and convincing evidence.

The committee discussed these problems in light of the following questions:
1. Do we want a different standard of proof in different kinds of cases?
2. If we want one standard, should it be "preponderance" or "clear and convincing" for best interest analysis? Remember, the ***statute*** does not require one or the other.
3. What policy choices should inform our decisions one way or the other?

The committee concluded that it would be best to have one standard for "best interests" analysis in all kinds of TPR cases. It also concluded that the "best interests" analysis should be based on a preponderance of the evidence standard. The reasons for this are as follows:

1. Although the committee did not do exhaustive research, it concluded that in similar areas of the law, such as child custody cases without an established custodial environment, the best interests of the child are determined on a preponderance of the evidence standard. Also, see *Bowerman v McDonald,* 427 Mich 1 which held in that paternity cases which are fundamentally civil, where the act is silent the burden of proof is preponderance. See also *Huggins v Rahfeldt,* 269 Mich App 740. Paternity cases are good to use by analogy since paternity cases are not purely civil but has some qualities of a criminal case such as a right to an attorney. Since MCL 712A.19b(5) is silent as to the burden of proof for best interest, the committee believes it can be argued that (the silent burden) was intentional because MCLA 712A.19b(3) sets forth the burden for termination as clear and convincing for the statutory grounds only.
2. The committee was concerned that a clear and convincing evidence standard for best interests could lead to an interpretation that expert testimony is required in every case to meet this level of proof. While expert testimony about the child's best interests is desirable and frequent in these kinds of cases, some cases (such as parental abandonment, for example) can be decided without reference to expert testimony, and a perception that the clear and convincing evidentiary standard would compel expert testimony could add unnecessary delay and expense.
3. Regarding policy choices, the committee believes the policies should track stability, permanency, and factors outlined by the federal statute and what is required under CFSR. A preponderance of evidence standard, being easier to meet by the moving party, serves these goals.

In order to write this into the proposed court rules, the committee suggests:
1. For MCR 3.977(E), remove the proposed best interest language from subsection 2, add a semi-colon and the word "and" at the end of subsection (3), and add a provision denoted subsection (4) which would read: "(4) termination of parental rights is in the child's best interest based on a preponderance of the evidence presented."

2. For MCR 3.977(F), remove subsection (iii) and the already deleted language and add a provision as subsection (3) which would read: "(3) termination of parental rights is in the child's best interest based on a preponderance of the evidence presented."
3. For MCR 3.977(G), it would be necessary to substantially change the structure of subsection (3). The committee suggests the following:

> "(3) The court must order termination of the parental rights of a respondent and must order that additional efforts for reunification of the child with the respondent will not be made, if the court finds
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> (a) on the basis of clear and convincing evidence admitted pursuant to subrule (G)(2) that one or more of the facts alleged in the petition
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> (i) are true, and
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> (ii) come within MCL 712A19b3, and
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> (b) termination of parental rights is in the child's best interest based on a preponderance of the evidence presented."

XI. Proposed Rule MCR 3.978 – This adds a provision to allow appointment of a juvenile guardian in post-termination cases.

COMMITTEE COMMENT: None. This proposed rule accurately implements the statute. (MCL 712A.19c (2008 PA 203))

XII. Proposed Rule MCR 3.979 – This is a whole new court rule to implement the juvenile guardianship statute and provide the procedures for courts to follow.

1. MCR 3.979(A) – Processes for establishing Juvenile Guardianships

COMMITTEE COMMENT: MCR 3.979(A)(1) accurately tracks the requirements of MCL 712a.19a(9) and MCL 712a.19c(8). No modifications are suggested.

MCR 3.979(A)(2) is not a statutory provision, but makes a good policy determination to maintain a child in foster care until the approval required in subsection (A)(10) is obtained. No modifications are suggested.

MCR 3.979(3) is to implement the option of a juvenile guardianship in a post-termination of parental rights situation as authorized in MCL 712A.19c(2) – (13). The committee makes the following observations:

- MCR 3.979(A)(3) sets a 28 day time limit for the MCI superintendent to file his or her consent. This is not in the statute, and while 28 days should be a reasonable time, perhaps the rule should allow the court to extend the time for cause; e.g., if the superintendent requested a psychological from the proposed guardian, or other concerns were raised.
- MCR 3,979(A)(3)(a) refers to the "person or agency" denied consent. The statute only refers to "persons" denied consent, and the committee is not aware of situations where and agency would be applying for a juvenile guardianship.

Other than these issues, the committee believes the process described is consistent with and will accommodate the statutory requirements, and provide a workable framework for this class of cases.

2. MCR 3.979(B) – Orders Appointing Juvenile Guardians

COMMITTEE COMMENT: The proposed rule contemplates the kinds of documents in a juvenile guardianship as in an EPIC guardianship (Order Appointing, Acceptance of Appointment, and Letters) and the committee agrees that this is advisable to use documents which are already widely recognized in the legal and business community. There are potential problems the could arise if a guardian moves with the juvenile under MCR 3.979(B)(4), such as: Are guardians allowed to move without permission of the court? Does the guardianship get transferred to the new venue of the guardian? What if the guardianship does not work out – is the neglect case reinstated in the original Family Division venue or in the new venue? The committee did not agree on whether or not these kinds of issues should be addressed in the court rule, so no changes are recommended.

3. MCR 3.979(C) – Jurisdiction, Review and Guardian ad Litem

COMMITTEE COMMENT: This provision as it relates to jurisdiction is required by MCL 712A.19a(10) and (11), and MCL712A.19c((0 and (10). The requirements for review, however, are somewhat different from and confused when compared to the statute. Conceptually, it appears from the statute that the court's jurisdiction under MCL 712a.2b terminates when the juvenile guardian is appointed. However, the rule seems to require a review pursuant to MCR 3.975 (a post-dispositional review hearing) or MCR 3.978 (a post-termination review hearing) within 91 days. How can these hearing be held if jurisdiction for those purposes has been terminated? The only statutory review once the juvenile guardianship has been established is annual. The committee suggests that the 91 day review language be removed, or in the alternative, just require a 91 day review of the juvenile guardianship without reference to MCR 3.975 or 3.978.

The committee also notes as a matter of general terminology that the proposed rule refers to the "Probate Code" when referring to provisions of MCL 712A.1 et seq. This same reference appears in Proposed Rule 3. 979(E). While this statutory scheme is found in the Michigan Probate Code broadly, traditionally cases involving minors and juveniles have been considered to be brought under the Michigan Juvenile Code pursuant to the legislative designation of that chapter ("Juveniles and Juvenile Division"). That term – the "Juvenile Code" – is in fact used in the existing court rules (see MCR 3.901(A)(1) which notes that these rules are to deal with "all cases filed under the Juvenile Code"). To maintain consistency, the Committee recommends that the proposed rule be changed and all reference to citations within MCL 712A.1 et seq. be referred to as the "Juvenile Code", rather than the "Probate Code". This would also help reduce confusion when juvenile guardianship procedures are contrasted with guardianships brought under EPIC – which are generally filed in the Probate Court, whereas juvenile guardianships will be handled in the Family Division of the Circuit Court.

4. MCR 3.979(D) – Court Oversight Responsibilities

COMMITTEE COMMENT: The committee suggests that if a an investigation is ordered under MCR 3.979(D)(2), either by the court or on request of DHS or an interested person, the report be served on the juvenile guardian and the other interested parties under MCR 3.921(D). Also, the court should appoint a Lawyer-Guardian ad Litem for the juvenile.

5. MCR 3.979(E) – Duties and Authority of Juvenile Guardian

COMMITTEE COMMENT: The committee suggests that the statutory provisions (MCL 712A. 19a(8) and MCL 712A.19c(7)) which incorporate by reference the general powers and duties of EPIC guardians be placed in the court rule as well. The current suggested provisions with respect to reporting and petitioning for conservatorship should be maintained.

6**. MCR 3.979(F) – Revocation or Termination of Guardianship**

COMMITTEE COMMENT: The committee is concerned with MCR 3.979(F)(5) which essentially requires the court to find that reasonable efforts were made to prevent the removal of the child from the guardians home. Who is going to provide services that can be pointed to as reasonable efforts to prevent removal? Certainly not DHS as their involvement stops by the appointment of the guardian and the closing of the neglect case. There is nothing in the statute requiring this and we do not believe that this is necessary for IV-E compliance. This would constitute a failure of the permanency plan requiring a change in the permanency plan. This also is not the same as removing a child from a parent.

The committee also questions 3.979(F)(7). If the guardianship is revoked and the neglect case is reopened this section creates a 42 day time period in which to have the first review hearing then the following reviews are the same as if the case were just initiated as a neglect case. The committee agrees that there should be an initial review with an updated case service plan and presumably DHS would need some time to prepare such a plan. However, the committee believes that 42 days is too long. If this were an initial petition where the children were removed there would be an immediate hearing with recommendations for a case service plan. The committee believes the time period for the submission of a case service plan should be reduced to 28 or 30 days (the latter would be consistent with the time requirement in a new neglect/abuse case – see MCR3.965(E)(1))

Respectfully submitted by the MPJA committee assigned to review these rules,
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